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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

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INTRODUCTION

Over the last fifty years, the representative branches have resolved numerous difficult issues through the enactment of provisions for congressional approval or disapproval. Among those currently in effect are statutes which govern the relation-

ship between the Congress and the executive in critical areas of foreign affairs and national security, the budget, international trade, and energy. *See* Sen. Br. 37–48. With the sole exception of the War Powers Resolution, 50 U.S.C. 1541–1548 (1976), these laws were approved by the Presidents to whom they were presented.

Even as it struck down section 244(c)(2) of the Immigration and Nationality Act, the court of appeals appreciated the novelty of its holding and the disparateness of the public issues which provisions for legislative review address, and took care to limit its holding to the Immigration and Nationality Act. Citing the Nuclear Non-Proliferation Act and the Federal Trade Commission Act as two examples, the court cautioned that some statutes "might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device" (J.S. 55a).[1] It eschewed respondents' Presentation Clause theory, which is designed to invalidate all of the many accommodations between the Congress and the President that utilize procedures for congressional review. Instead, the court analyzed the features peculiar to section 244 and concluded that section 244 violated the separation of powers, without intimating what the result ought to be in other contexts.[2]

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[1] *See Consumer Energy Council* v. *FERC*, Nos. 80-2184, 80-2312, slip op. at 42 (D.C. Cir. Jan. 29, 1982) ("the *Chadha* court sought to minimize the reach of its holding").

[2] The court of appeals referred only briefly at the end of its long opinion to Article I, Section 7 (J.S. 59a), after reiterating that "the essence of the violation here was the violation of the separation of power rule" (J.S. 55a). In contrast, the D.C. Circuit, in *Consumer Energy Council* v. *FERC*, *supra* n.1, rendered a sweeping judgment on the scope of the Presentation Clause. The court invalidated section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3342(c) (Supp. III 1979), which provides for legislative review of a natural gas pricing rule of the Federal Energy Regulatory Commission, stating: "The primary basis of this holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress." Slip op. at 37.

On February 8, 1982, the Senate directed the Senate Legal Counsel to move for leave to intervene after judgment in order to seek further review of the D.C. Circuit's holding in this case. *See* S. Res. 315, 97th Cong., 2d Sess., 128 Cong. Rec. S470–71 (daily ed. Feb. 8, 1982).

The INS, in what amounts to an appeal from the narrow opinion of the court of appeals, asks (INS Br. 21–26) this Court to adopt a theory that would invalidate all provisions for legislative review. The American Bar Association supports (ABA Br. 1) this view. Both the respondents and the amici ask the Court to discard its traditional rules of restraint and to upset scores of major federal statutes whose terms and operation are not illuminated by the administrative record in this case.[3]

In Part I, *infra*, we reply to several new arguments which respondents make to support their claim that this Court may sever and refashion section 244 so that it delegates to the executive the final authority to grant permanent residence to deportable aliens, a power which the Congress has consistently denied it. Chadha would have standing to raise his constitutional challenge only if the legislative review authority of section 244 could be severed from the executive's recommendatory authority. The language, legislative history, and method of operation of section 244 demonstrate, however, that it may not be severed. Congress designed section 244 as an integrated procedure, and it may be challenged only in its entirety. Furthermore, it is a legislative, not a judicial, responsibility to revise it if it is unconstitutional. Contrary to respondents' assertion, the Court may not decide the constitutionality of section 244 in this case, because its inseverability means that no relief can be granted to Chadha. Fortunately for Chadha, the Court need not decide the case to provide him with relief from deportation, because, as he concedes, his marriage to an American citizen and the Refugee Act of 1980 render him "apparently eligible for relief from deportation" (Chadha Br. 25).

[3] The INS also reverses the consistent position of the executive branch over the past forty years. Our opening brief discussed (Sen. Br. 11–12) the close relationship between the legislative review provisions of the Immigration and Nationality Act and those of the Reorganization Act of 1939. We pointed out (Sen. Br. 12, 14, 16) that since the adoption of the 1939 Act the executive has consistently defended the constitutionality of the reorganization provisions. In response, the INS simply repudiates (INS Br. 58 n.37) that historic executive position. The failure of the executive to harmonize its position in this case with its longstanding view further highlights the caution with which INS's request for a sweeping constitutional decision should be considered.

In Part II, *infra*, we demonstrate that the discretionary power shared by the branches under section 244 is not an adjudicatory or an enforcement power. Section 244 is a singular arrangement through which the political branches share the exercise of discretion to grant aliens dispensation from the requirements of a mandatory deportation law. It is a unique exercise of the power of the national government to admit aliens, which the Court may uphold without its anticipating how it might decide future challenges to other provisions for legislative review.

ARGUMENT

I

BECAUSE SECTION 244 MAY BE JUDGED ONLY AS AN INTEGRATED WHOLE, CHADHA LACKS STANDING

The history of section 244 is a history of repeated rejection by the Congress of requests from the executive for final authority to grant permanent residence to deportable aliens. *See* Sen. Br. 9–17. Yet respondents request this Court to interpret section 244 to grant to the executive the very power which the Congress has denied to it.

1. RESPONDENTS ADVANCE A NOVEL AND UNSUPPORTABLE TEST OF SEVERABILITY

The respondents propound a novel test of severability, which draws no support from the decisions of this Court. Chadha suggests (Chadha Br. 28), "The proper question . . . is, what would Congress have done had it known that its veto provisions were unconstitutional and thus could not be included?" *See* INS Br. 62. This Court has never determined severability by speculating what Congress would have done had it known what the Court might someday decide. It has sought instead to assess the actual intent of the enacting Congress: whether it "intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924).[4] The Court should reject respondents' speculation

[4] The question of intent is not even reached unless "what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). *See* pp. 7–9, *infra*.

that Congress would have enacted another law delegating final authority to the executive, if it had known that section 244(c)(2) would one day be held unconstitutional. Under the separation of powers this Court may not now make that legislative decision.[5]

2. RESPONDENTS MISCONSTRUE THE LEGISLATIVE HISTORY OF SECTION 244

In the court of appeals, the respondents relied on a remark of Representative Dies' in 1937 as the key fragment of relevant legislative history. This became the sole basis for the court of appeals' conclusion "that section 244's purpose was to alleviate the onerous burden of numerous private bills" (J.S. 14a–15a). Our opening brief noted (Sen. Br. 25 n.41) that Representative Dies had been speaking, three years before the antecedent of section 244 was enacted, in favor of a different bill, to give the Attorney General final authority to grant permanent residence to deportable aliens without legislative review and that this bill had failed. Now, in their opposing briefs, respondents rest their case (INS Br. 62–63; Chadha Br. 32) on another fragment of legislative history, a 1949 report of the House Judiciary Committee, H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949), which criticized as unworkable the affirmative approval procedure in the Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206.

However, the bill reported by the committee in 1949 was a further rejection of an administration bill to give the Attorney General final authority to cancel deportations and to grant permanent residence. In 1947, the committee had rejected the administration's request for final authority, because "the best interests of the country would be served by limiting the pro-

[5] It is impossible to determine what other statute Congress might have enacted. An accommodation could have taken various forms, such as temporary authority or executive authority limited in other ways. For example, the House bill in the 76th Congress (which may be the best indication of what the Congress would have done without the Senate compromise) authorized temporary suspensions of deportation by the executive, but required legislation to cancel deportations. *See* Sen. Br. 11. This Court cannot divine what Congress would have done "without [making] an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

posed extended powers," and had reported instead an amendment to provide that "the *recommendation* of the Attorney General can be rejected by a resolution of either of the two Houses." H.R. Rep. No. 647, 80th Cong., 1st Sess. 2–3 (1947) (emphasis added). The bill reported by the committee in 1949 "simply repeat[ed] the language contained in the bill passed by the House in 1947. . . ." H.R. Rep. No. 362, *supra* p. 5, at 2. Hence, the 1949 report does not suggest that the committee would have proposed legislation to grant the executive final authority rather than relying on private legislation.[6]

Moreover, respondents' statutory argument fails to give effect to the actual choice made by the Congress. In enacting

[6] The respondents also exaggerate (INS Br. 62–64; Chadha Br. 29–32) the concern of the Congress, during the consideration of section 244 and its antecedents, over private immigration bills. The Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670, was enacted during the 76th Congress. Virtually no private immigration legislation existed before 1937, and the 75th Congress enacted only thirty private immigration and nationality bills. The single Congress in which the greatest number of private immigration and nationality bills, 1,227, were enacted, was the 84th Congress, several years after the passage of the Immigration and Nationality Act of 1952. *See* Annual Report of the INS, Table 55, at 135 (1977). The facts belie Chadha's argument that in 1952 the 82d Congress would have delegated final authority to the executive rather than "to return to the days of the private bill (Chadha Br. 32). To the contrary, private immigration and nationality legislation became a much *greater* part of the work of succeeding Congresses.

As part of its request in 1947 for final authority to cancel deportations, the administration proposed to restrict private immigration bills to aliens outside the United States. H.R. 2933, § 3, 80th Cong., 1st Sess. (1947). The House Judiciary Committee rejected this bar, and reported, with its 1947 deportation bill, a provision to limit the introduction of private bills to aliens who the Attorney General indicated had exhausted all administrative remedies. H.R. Rep. No. 647, *supra*, at 3–4. Even this limited restriction on private bills failed. In contrast, during the same period Congress did prohibit by statute the consideration of private bills for injuries compensable under the Federal Tort Claims Act, 2 U.S.C. 190g (1976).

In 1962, when Congress gave section 244 its present form, the House rejected a Senate bill to grant the Attorney General discretion to record the permanent residence of aliens who had entered the United States before December 24, 1952: "If there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws *or through private legislation*." 108 Cong. Rec. 22607 (1962) (remarks of Rep. Walter) (emphasis added).

section 244 the Congress considered three alternatives: to use private legislation exclusively (and perhaps rarely) to grant relief, to grant final authority to the executive, or to devise an arrangement for shared responsibility. The Congress firmly rejected the grant of final authority to the executive. We detailed (Sen. Br. 9–17) the history of Congress's repeated rejection of executive requests for final authority to cancel deportations, between 1934 and 1938, and in 1947, 1956, and 1957, which respondents have not rebutted. After barring the grant of final authority to the executive, the Congress made a series of choices from 1940 to 1962 regarding the sharing of discretionary authority to grant relief, while retaining and using the alternative of private immigration legislation. This history precludes the Court from interpreting section 244 to grant the executive final authority to cancel deportations.[7]

3. SECTION 244 MAY NOT BE JUDICIALLY REFASHIONED AS RESPONDENTS PROPOSE

The court of appeals severed subsection 244(c)(2) from section 244 because "section 244(a) operates independently of section 244(c)(2)" and is a complete delegation of authority to the Attorney General to grant permanent residence to deportable aliens (J.S. 15a). In our opening brief (Sen. Br. 24–25), we argued that subsection 244(a) is not an independent grant of

[7] Of course, the current or a future Congress might make a choice different from that which Congress repeatedly made between 1934 and 1962. To demonstrate that the legislative process remains open, we brought to the Court's attention (Sen. Br. 28 n.46) bills which were reported by the Senate and House Judiciary Committees in the 96th Congress, but were not enacted, to eliminate congressional review of suspensions of deportation. The respondents suggest (INS Br. 64–65) that the Court should conclude from these repeal proposals that the present Congress would favor a grant of final executive authority over the consideration of private bills. That suggestion is irrelevant, for the Court must construe the legislation which the Congress has enacted, not anticipate the legislation that Congress may pass. *See Marchetti* v. *United States*, 390 U.S. 39, 59–60 (1968) ("We cannot know how Congress would assess the competing demands . . .; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values").

authority, but an introduction to subsections 244(c) and (d), in which the authority to cancel deportations and to record permanent residence is legislated. Without subsection 244(c)(2), section 244 is not "fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission, supra* n.4, 286 U.S. at 234.

Neither respondent defends (INS Br. 60–65; Chadha Br. 26–32) the untenable conclusion of the court of appeals that subsection 244(a) is an independent grant of final authority to the Attorney General. Instead, respondents recognize the need for subsection 244(c)(2) to effect the grant of permanent residence. Chadha describes the final sentence of subsection 244(c)(2), which requires the Attorney General to cancel deportation proceedings if neither House passes a resolution of disapproval, as "the operative provision" (Chadha Br. 28). To make it operate, he advances the fiction of "treating any veto which occurs as a nullity, and hence the equivalent of no veto at all" (*id*). The INS proposes (INS Br. 61 n.39) to transform section 244 into a "report and wait" statute. INS would report to Congress every suspension pursuant to subsection 244(c)(1), and each deportation would be canceled at the end of the waiting period, unless the Congress had enacted a statute deporting the alien. In this way, INS elaborates, "Congress would retain the power to pass a *law*, in accordance with the requirements of Article I, requiring the alien's deportation, subject to whatever restraints may be imposed by the Bill of Attainder Clause, Art. I, § 9" (*id.*). Respondents advance these arguments for the first time in this Court.

The interpretations which respondents propose are not the statute which Congress enacted. At the very time Congress was considering the Alien Registration Act of 1940, in which it first adopted a procedure to cancel deportations, the Congress also had before it H.R. 9766, 76th Cong., 3d Sess. (1940), a bill to require the Attorney General to deport an individual alien, Harry Bridges. The bill passed the House on June 13, 1940. 86 Cong. Rec. 8215 (1940). Attorney General Jackson condemned the bill as "an historical departure from an unbroken American practice and tradition. It would be the first time that an act of Congress has singled out a named individual for deportation." S. Rep. No. 2031, 76th Cong., 3d Sess. 9 (1940) (reprinting

Jackson's letter of June 18, 1940). One week later, on June 25, 1940, the Attorney General examined the enrolled bill for the Alien Registration Act, including its provisions for the cancellation of deportations, and found "no objection to the approval of the bill." [8]

Under the successor to the Alien Registration Act, the Congress does not determine the deportability of individual aliens. The Congress determines only whether to grant permanent relief from deportation. If relief is denied, deportation results from the executive's adjudicatory determination of deportability based on general standards established by legislation. The Attorney General attacked the bill to deport Bridges, saying, "By this bill the United States would deny faith and credit to its own duly conducted legal proceedings." S. Rep. No. 2031, *supra* p. 8, at 9. That criticism could not be levied against the Alien Registration Act, which provided not for the reversal of final executive decisions but for the acceptance or rejection of executive recommendations to grant relief. Congress followed the Attorney General's advice; the Bridges deportation bill failed and the Alien Registration Act became law.[9] Nevertheless, the INS now asks this Court to construe section 244 to require the Congress to enact legislation to deport individual aliens.[10] Although the respondents have correctly abandoned the statutory analysis of the court of appeals and now recognize that subsection 244(c)(2) is necessary to the statute, their efforts to reform section 244 violate the intent of Congress that permanent residence be "granted through congressional action." [11] The severability clause in the Immigration and Nation-

[8] Letter from Attorney General Robert H. Jackson to Harold D. Smith, Director, Bureau of the Budget (June 25, 1940) (on file in the National Archives).

[9] The Senate Committee on Immigration amended the Bridges bill to direct the Attorney General to investigate Bridges and to deport him in the manner provided by law "if, in the opinion of the Attorney General, such investigation produces facts justifying such action. . . ." H.R. 9766, as reported with amendments by S. Rep. No. 2031, *supra* p. 8. The bill then died. In the next Congress, the House passed another bill to deport Bridges, 87 Cong. Rec. 7675 (1941), which also failed in the Senate.

[10] As the Solicitor General recognizes (INS Br. 61 n.39), private deportation legislation would invite serious questions under the Bill of Attainder Clause, Article I, Section 9.

[11] H.R. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952). *See* Sen. Br. 26 n.42.

ality Act does not aid respondents' proposals to revise section 244, for no severability clause authorizes the Court "to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. *This is legislative work beyond the power and function of the court.*" *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922) (emphasis added).

4. THEREFORE, THE COURT OF APPEALS RENDERED AN UNNECESSARY JUDGMENT ON THE CONSTITUTIONALITY OF SECTION 244

If the Court were to conclude that Congress's role in granting permanent residence under section 244 is unconstitutional, it would be required, in fulfillment of its obligation to interpret faithfully the intent of the enacting Congress, to invalidate the entire procedure for granting relief.[12] Chadha could gain nothing from such a resolution of the case because neither the Court nor the INS would have statutory authority to grant relief under the statute as stricken and he would remain deportable for having overstayed his visa. *See* Sen. Br. 24–28.[13] Fortunately for Chadha, this question is academic, for he has other statutory means available to acquire permanent residence. *See* Chadha Br. 25; p. 13, *infra*.

The INS argues "that a party may raise a constitutional claim even if the challenged provision ultimately may not be

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[12] This would leave to the present or a future Congress the legislative question of whether to replace section 244 with a delegation of final authority to the executive, or with another procedure, to grant permanent residence to deportable aliens. There would be no reason to disturb prior grants of permanent residence through section 244, as Chadha speculates (Chadha Br. 29 n. 11), for the Court may recognize their "*de facto* validity." *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam).

[13] *See United States ex rel. Hintopoulos* v. *Shaughnessy*, 233 F.2d 705, 708–09 (2d Cir. 1956), *aff'd on other grounds*, 353 U.S. 72 (1957) ("if the grant of power [to approve or to withhold a suspension] were invalid, the appellants and all other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized").

severable in a way that would entitle the claimant to relief" (INS. Br. 75). Chadha argues that "the court below was in error in first ruling on severability because it departed from the practice this Court has consistently followed in deciding severability only after finding an act to be unconstitutional" (Chadha Br. 27). Neither proposition is correct.

This Court does not give advisory opinions. Thus, it has never held an act of Congress unconstitutional while barring relief to the litigant because of the inseverability of the invalidated statute. The INS cites (INS Br. 75) *Orr* v. *Orr*, 440 U.S. 268 (1979), in which the Court granted a husband standing to challenge on equal protection grounds an Alabama divorce law providing for the payment of alimony only to wives. The Court observed (*id.* at 272) that it was impossible to know whether the state legislature would respond to the invalidation of the gender-based law by repealing the provision for alimony or by extending alimony benefits to spouses of both sexes. While it was *possible* that the Alabama legislature would act in such a way that the husband would gain nothing, the Court refused to speculate on how the legislature might reform the statute. It is always true, and never relevant, that subsequent legislative amendment may alter a litigant's ultimate relief. The Court should not speculate on the possible response of Congress to this litigation; it is the past action of the Congress in enacting an inseverable statute, not a speculative future action, which bars the award of relief to Chadha.

The INS also cites (INS Br. 75) *Califano* v. *Westcott*, 443 U.S. 76 (1979), in which this Court affirmed the invalidation of a gender-based classification in a federal welfare statute and sustained the lower court's remedy of extending the benefits in disregard of the invalid classification. The Court provided the litigant with relief after concluding (*id.* at 90) that the statute *was* severable. Indeed, as the Court observed (*id.* at 90–91), no party had argued that the statute's invalid classification was inseverable from the entire Aid to Families with Dependent Children program. At issue was not whether the program could be severed, but how the program should be ad-

ministered to conform to the intent of Congress after the offending classification was excised. *See id.* at 91–93.[14]

Thus, in each of these cases, the litigant either received relief when the Court severed the statute or obtained a possibility of relief, depending on subsequent judicial or legislative action. In contrast, the INS suggests that the Court should invalidate section 244 as a whole, if it concludes that its subsections may not be severed, even though such action would permanently foreclose Chadha from receiving relief. The INS defends this novel and extreme position by suggesting that, if Chadha does not have standing, "a legislature could insulate *any* unconstitutional aspect of a benefit program from challenge simply by specifying that the constitutionally dubious aspect is not severable from the remainder of the program" (INS Br. 75).[15] INS's fear is misplaced. First, this case is peculiarly distinct from the generic "underinclusive benefits" cases. As Justice Brandeis observed, in discrimination cases "[t]he right invoked is that to equal treatment; and such treatment will be attained if either . . . [others' burdens] are increased or their own reduced." *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). Moreover, the conjecture that Congress would deliberately prevent judicial review by inserting an unconstitutional provision in an inseverable statute is unwarranted. The enactment of procedures for legislative review followed careful and conscientious consideration of the constitutional

[14] In the third case cited by INS (INS Br. 75), *Stanton* v. *Stanton*, 421 U.S. 7 (1975), the Court invalidated the application of Utah's age-of-majority law to child support obligations. The Court remanded to the Supreme Court of Utah to determine whether the age of majority should be set at 18 or 21, an issue of state law. Even if this may be seen as a standing question (the Court did not discuss it as one, *id.* at 17–18), it indicates a rejection of only the contention that the mere *possibility* of a litigant's ultimate inability to secure relief under state law, based upon subsequent action by an independent state authority, should preclude adjudication of a federal right.

[15] Generally " '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 227." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4110 (U.S. Jan. 12, 1982) (No. 80-327).

issues as illuminated by contemporary decisions of this Court. *See* Sen. Br. 12 n. 12. Section 244 is inseverable because the Congress created a unitary procedure to grant relief to aliens, not because it sought to prevent judicial review.

Nor is Chadha correct in his argument that it is the practice of this Court to decide that a statute is unconstitutional before deciding whether it is severable. It is true that in *United States* v. *Jackson*, 390 U.S. 570 (1968), and *Buckley* v. *Valeo*, *supra* n. 12, the Court severed unconstitutional statutes in opinions in which the discussion of unconstitutionality preceded the discussion of severability. However, those are simply indications of the order in which parts of an opinion may be arranged. We know of no case in which the Court has gratuitously decided that an act of Congress is unconstitutional even though the invalidation provided no relief because of the inseverability of the statute. *See Carter* v. *Carter Coal Co.*, 298 U.S. 238, 316 (1936) (holding price-fixing provisions of statute inseverable and "thus disposed of without coming to the question of their constitutionality").

Further, respondents continue to press this constitutional challenge although Chadha has been eligible to obtain an adjustment of status, merely by filing an immediate relative petition, for the past one and one-half years.[16] Chadha concedes that his marriage and the Refugee Act of 1980 render him "apparently eligible for relief from deportation" (Chadha Br. 25). He thus recognizes that the assertion of the court of appeals that "the Attorney General will deport Chadha . . . unless we rule in Chadha's favor" (J.S. 19a) is inaccurate. Chadha's justification for pursuing a constitutional judgment, instead of the alternative statutory avenues for relief, is his interest in acquiring citizenship sooner, even though there is no statutory basis for a retroactive grant of permanent residence. *See* Sen. Br. 20 n. 33.[17]

[16] Chadha states that "if he adjusts his status on account of his wife's citizenship, he must wait three years in addition to the year it is likely to take to change his current status" (Chadha Br. 26). Having so far refused for one and one-half years even to file the petition, Chadha is not in a position to base his right to constitutional adjudication on administrative delay in processing adjustment of status petitions.

[17] The court of appeals' deduction, in order to keep this case alive, that "the five-year waiting period for citizenship has already expired, thus mak-

Hence, Chadha's sole interest in this litigation is to pursue a doubtful claim that he is entitled to earlier citizenship through naturalization. This case is no longer, in any real sense, a proceeding to review a final order of deportation, and it has become an inappropriate vehicle to adjudicate the significant constitutional issues presented to the Court.[18]

II.

THE REPRESENTATIVE BRANCHES MAY SHARE THE POWER TO GRANT DISPENSATION FROM MANDATORY DEPORTATION LAWS

We agree with the conclusion of the court of appeals (*see* n. 2, *supra*) that the key constitutional issue in this case concerns separation of powers principles, not conformance with Article I, Section 7. Congressional review under subsection 244(c) does not attempt or purport to be an act of original lawmaking.[19] Such legislative review is undertaken under the limited authority of a prior statute, which was enacted under the procedures mandated by Article I, Section 7. INS's argument (INS Br. 21–26) establishes the undeniable importance of bicameralism and presentation. It does not, however, help the Court resolve the constitutionality of a statute enacted under those procedures. The equation of legislative review pursuant to a prior statute with original lawmaking could result in the invalidation of scores of major statutes without any consideration of their individual status under the separation of powers. Such an

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ing Chadha eligible to apply for naturalization" (J.S. 17a–18a n.6), was both a judicial invention and beyond the court's jurisdiction. Exclusive federal jurisdiction to naturalize citizens is conferred upon district courts, 8 U.S.C. 1422(a) (1976). Thus, regardless of the disposition of this case, Chadha can become naturalized only by filing a naturalization petition in a district court. The INS's plea (INS Br. 77) not "to deprive Chadha of the benefit of the judgment below [nor] . . . to force him to relitigate the date on which he acquired permanent resident status . . . [in a naturalization petition]" is misconceived.

[18] "Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme." *Valley Forge Christian College, supra* n. 15, at 4110.

[19] *See Buckley* v. *Valeo, supra* n. 12, at 285 (White, J., concurring and dissenting).

approach is inconsistent with sound principles of judicial restraint.

Rather, the limited constitutional question on which the court of appeals more properly focused is the consistency of the particular roles of the executive and legislative branches under section 244 with the separation of powers doctrine. The INS states that "this case involves a legislative veto of an order issued in an administrative *adjudication*. . ." (INS Br. 49 n. 32). Neither the executive's discretionary decision to suspend the deportation of an eligible alien, nor the ultimate congressional decision to grant dispensation from the requirements of mandatory deportation laws, may be readily classified in conventional separation of powers terms. As this Court recently stated, "[I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." *Dames & Moore* v. *Regan*, 101 S. Ct. 2972, 2977 (1981).[20]

The court of appeals recognized that section 244 authorizes the Attorney General, and by subdelegation the INS, to perform two distinct functions: the determination of eligibility for relief under specified standards and the exercise of discretion over relief among the eligible aliens. "The suspension proceeding 'has two phases: a determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] . . . is confided to the sound discretion of the Attorney General [and his delegates].' 2 C. Gordon & H. Rosenfield, [Immigration Law & Procedure] § 7.9a(5)[,] at 7–134 [(rev. ed. 1981)]" (J.S. 39a). The dual nature of the task before the INS derives from the explicit language of subsection 244 (a), which states that "the Attorney General *may, in his discretion,* suspend deportation . . . in the case of an alien who" meets various statutory prerequisites (emphasis added). "Congress has not granted relief to all qualified applicants but has

[20] *See Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories. . . . [They] have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with the confession that all recognized classifications have broken down. . .").

declared that relief may be awarded in the discretion of the Attorney General. The administrative officers must exercise their discretion in determining whether to award relief to qualified applicants, and in this aspect their power is most expansive." 2 C. Gordon & H. Rosenfield, *supra* p. 15, § 7.1b, at 7–11.

This Court has accordingly held, "[T]he statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met." *United States ex rel. Hintopoulos* v. *Shaughnessy*, *supra* n.13, 353 U.S. at 77. "Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General." *Jay* v. *Boyd*, 351 U.S. 345, 353 (1956). *See* 2 C. Gordon & H. Rosenfield, *supra* p. 15, § 8.15c, at 8–130 to –131. The Solicitor General has made the identical point: "If an alien meets all three eligibility requirements, the Attorney General must then decide whether suspension relief is warranted in the exercise of his 'unfettered discretion.' " Petition for Certiorari at 10, *INS* v. *Wang*, 450 U.S. 139 (1981).

The INS's exercise of "unfettered discretion" cannot be categorized within the formal tripartite scheme of separated powers. It is certainly not adjudicatory because it does not involve the application of fixed standards to individual cases, as does the INS's threshold determination of eligibility. Likewise, the reserved authority of the Congress to determine whether to grant permanent residence is a discretionary power that does not fit easily into a theoretical model of separation of powers.

Rather, section 244 is a special arrangement to achieve broad agreement within the political branches when it would be "unconscionable" S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952), to enforce mandatory deportation laws. By giving the initiatory power to the executive and requiring a final determination by the Congress within a fixed period of time it creates an effective system by which the elected branches may agree to grant dispensation. The sharing of discretionary authority to achieve equity is an effort to reconcile the desire

for humane government with principles of democratic accountability and does not merit charges of legislative tyranny.[21]

Section 244 satisfies both aspects of the separation of powers standard of *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). It is neither disruptive nor unnecessary. The limited arrangement to share authority to exercise unfettered discretion to grant relief from deportation does not interfere with historically traditional or inherently executive functions of the executive branch, such as initiating prosecutions.[22] Nor does section 244 interfere with the executive's responsibility to enforce the law. "When Congress enacts a statute that is complete in policy aspects and ready to be executed as law, Congress has recognized that enforcement is only an executive function. . . ." *FTC v. Ruberoid Co., supra* n. 20, 343 U.S. at 488 (Jackson, J., dissenting). Section 244 is not, however, "complete in policy aspects"; it provides no standards by which discretion should be exercised to grant permanent residence to eligible deportable aliens. Its limited function is

[21]Dean Landis commented at about the time Congress first invoked legislative review to resolve impasses concerning reorganization and relief from deportation, "[T]he devices, virtually, have all the benefits of delegation, [but] they do not run the risk of what the courts have called 'abnegation.'" J. Landis, The Administrative Process 79 (1938).

The Court has sustained other flexible arrangements to exercise governmental authority over the award of a valuable benefit. For example, it upheld authority conferred on the President by Congress under the Civil Aeronautics Act, ch. 601, § 801, 52 Stat. 973, 1014 (1938) (current version at 49 U.S.C. 1461 (1976)), to exercise "positive and detailed control over the [CAB's] decisions, unparalleled in the history of American administrative bodies," regarding overseas and foreign air transportation applications, while foreclosing judicial review. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948). The Court observed, "Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." *Id.* at 110.

[22]The constitutional commitment of prosecutorial discretion to the executive branch is firmly established. *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081–82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). Congress has long recognized the inherently executive nature of the prosecutorial function. *See* L. White, The Federalists 454–55 (1948) (power of United States Attorneys regarding initiation of prosecutions viewed by Congress from 1790's as "highly discretionary").

to establish a procedure by which the executive and the Congress may agree in future cases that the application of mandatory deportation laws would be "unconscionable."

CONCLUSION

Myers v. United States, 272 U.S. 52 (1926), was the first of the only two cases in which this Court has struck down an act of Congress as an infringement on executive power. The Court reviewed the long history of litigation over the removal power, noting that it had "studiously avoided deciding the issue until it was presented in such a way that it could not be avoided. . . ." *Id.* at 176. Even then, the Court wrote so broadly that within a few years it found it necessary to narrow its holding as it responded to the diversity of arrangements which the representative branches had fashioned to govern the nation. *See Humphrey's Executor v. United States*, 295 U.S. 602, 626–27 (1935). In recounting this episode, Justice Frankfurter commented that "[t]he versatility of circumstances often mocks a natural desire for definitiveness." *Wiener v. United States*, 357 U.S. 349, 352 (1958).

Respondents continue to press their constitutional claims in a review of a deportation order that has become academic. The judgment of the court of appeals should be vacated, and the case should be remanded to the INS to determine the availability of statutory relief. Alternatively, the Court may resolve the case by a plain reading of the statute and of Congress's intent: section 244 is a unitary relief procedure, which may not be severed and refashioned as respondents propose. Finally, if the merits are reached, section 244 should be upheld on the narrow basis of this special arrangement adopted by the Congress and the President to share discretion to grant dispensation from mandatory deportation laws.

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